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Office of Administrative Law Judges
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Issue Date: 19 January 2006

Case No: 2004-BLA-5742

In the Matter of

LARRY M. LACY

Claimant

v.

KEN LICK COAL COMPANY, INCORPORATED

Employer

AMERICAN RESOURCES INSURANCE COMPANY

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

James D. Holliday, Esq
Hazard, Kentucky

For Claimant

H. Brett Stonecipher, Esq.
Ferreri & Fogle
Lexington, Kentucky

For the Employer

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER — AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On February 4, 2004, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Prestonsburg, Kentucky on March 15, 2005. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. They also are based upon my observation of the appearance and demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX," "EX," and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

Administrative Law Judge exhibits 1 and 2; Director's exhibits 1 through 40; Claimant's exhibit 1; and Employer's exhibit 1 were admitted into evidence pursuant to 20 C.F.R. § 725.456. (Tr. 6-7; Tr. 8-10).

The Notice of Hearing and Pre-hearing Order gave direction to the parties concerning the matters to be considered in the briefing of the issues involved in this case. The briefing order indicates as follows:

> Any ISSUE not specifically addressed on brief will be considered abandoned by that party for decisional purposes. Each party will make specific, all inclusive FINDINGS OF FACT with respect to each issue being briefed.
>
> All contentions concerning fact and law as to individual issues which are not made on brief will be considered waived. The absence of FACTUAL FINDINGS or

> arguments concerning record evidence will constitute an admission that they are of no importance in the disposition of the issue and that the party has abandoned any contention concerning the applicability of the ignored evidence to the pertinent issue.

The directive includes the warning that if a party fails to fully argue an issue or to make complete factual findings concerning that issue, that they have waived any consideration as to the argument or as to the facts, and have abandoned the matter in its entirety, both factually and legally, as a result of the omission.

The issues and facts being discussed in this opinion are those which have been raised by the parties. All other legal and factual contentions are considered abandoned.

ISSUES

The following issues remain for resolution:

1. Whether the claim was timely filed;

2. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

3. Whether Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether Claimant is totally disabled;

5. Whether Claimant's disability is due to pneumoconiosis; and

6. Whether the regulations are Constitutional.[1]

(DX 35; Tr.6-8).

[1] The employer raises the issues of whether the new regulations are constitutional and whether they violate the Administrative Procedure Act. These challenges are beyond the authority of an administrative law judge, but are noted and preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Larry M. Lacy, was born September 13, 1948. (DX 3; DX 10). He was married to Janie Prater on October 25, 1969, and they are still married and live together in Morgan County, Kentucky. (DX 3; DX 10; DX 14). They have no dependent children at this time.

Claimant testified that he started having breathing problems while working at Ken Lick. (DX 14). He left the Employer in 1987 when they "went out of business" and was self-employed in the logging industry until May of 2001. Mr. Lacy quit this business "because of his lungs." (DX 14). Drs. Anderson and Myers have examined Claimant in the past for his state medical claim, and Claimant is currently seeing Dr. Kevin Lewis, who has prescribed an inhaler for Claimant's breathing problems. (DX 14). He sees Dr. Lewis approximately every three months. He has also been treated by Dr. Thomas Tolbert, Dr. Morris Peyton and Dr. George Bellamy at the VA Hospital. Drs. Bueller and Adams have also seen him for his pulmonary problems. (Tr. 13-14). Dr. Spencer, now deceased, was his family physician for several years. (DX 14). Mr. Lacy stated that doctors have prescribed several types of medication for his pulmonary difficulties, but he prefers to stay away from medication because he does not like some of the "side effects." (Tr. 14).

Mr. Lacy stated in his deposition that he could no longer work eight hours a day, five days a week. Dust in the workplace bothers him, causing him to become hoarse and "run out of air." (Tr. 15). All of his past mining jobs involved some physical exertion. His daily routine now consists of eating breakfast, exercising "as much as possible," and doing a little gardening. (Tr. 15-16; DX 14). He can no longer hunt or fish, but does perform some household chores. Claimant stated that he has no "air capacity" and continuously suffers from shortness of breath, a productive cough and some chest pain. Mr. Lacy also has a hiatal hernia, and he injured his back in 1990 in an auto accident. (DX 14).

Claimant testified that he has smoked for about 30 years at the rate of about one to 1½ packs of cigarettes per day, but quit smoking in 2003. (DX 14; Tr. 15).

Claimant filed his first application for black lung benefits on July 27, 1992. (DX 1). An Administrative Law Judge (ALJ) issued a Decision and Order Denying Benefits on November 7, 1997. (DX 1). The ALJ found that Claimant suffered from pneumoconiosis based on the x-ray and medical opinion evidence.

However, the ALJ also found that Claimant had not shown he was totally disabled by pneumoconiosis or any other lung disease. The Benefits Review Board (the "Board") affirmed the ALJ in a decision dated December 4, 1998. (DX 1).

Mr. Lacey filed his duplicate claim for benefits on April 22, 2002. (DX 3). The District Director issued a Proposed Decision and Order Awarding Benefits on October 24, 2003. (DX 34). Pursuant to the Employer's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing on February 4, 2004. (DX 35; DX 39).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. At the hearing, the parties stipulated that Claimant had 13 years of qualifying coal mine work. (Tr. 18). The record supports this stipulation, as revealed by Claimant's W-2 forms, Social Security Earnings Statement, and Claimant's testimony and work history reports. (DX 6-8; DX 14). Based upon my review of the record, I find that Claimant has established 13 years of qualifying coal mine employment.

The miner's last coal mine employment was with Ken Lick Coal Company and Mr. Lacy has not worked in mining since leaving that company in 1987. Mr. Lacy testified that he left the employer because it "went out of business." (DX 14). His last position was as a foreman and supervisor and operating heavy equipment on the surface. (DX 14). He first started in the "open pit area," and later became a heavy equipment supervisor. Claimant ran a drill "off and on" when necessary. He also worked as a "utility man," where he "ran about everything," doing "about anything" when necessary to keep the mines running. (Tr. 11). All of these jobs were in dusty conditions. In each of these positions, Mr. Lacy would consistently lift and carry 50 pounds or more. Claimant would also lift 100-125 pounds over a distance of 25-30 yards about 12 times each day. He would sit in coal dust all day while operating an auger. He also hauled coal for a short period. As a foreman and supervisor, he worked in dusty conditions and never worked in an office away from the coal dust.

Timeliness

On Form CM-1025, the Employer contested the timeliness of this claim and preserved this challenge at the hearing. (DX 39). Under § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to

the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed.

This duplicate claim was filed in 2002. Employer argues that Claimant was informed in 1995 of his total disability due to pneumoconiosis when Dr. Westerfield evaluated him.

For an Employer to rebut the presumption of timeliness, the Sixth Circuit requires that the miner be "told by a physician that he is totally disabled by pneumoconiosis." *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608 (6th Cir. 2001). The Board's interpretation of this requirement has been that the communication under Section 725.308(a) be a written medical report, found to be probative, reasoned, and documented by the administrative law judge, indicating total respiratory disability due to pneumoconiosis, and that it be communicated to the miner in such a manner that the miner was aware, or in the exercise of reasonable diligence, should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. *Adkins v. Donaldson Mine Co.*, 18 B.L.R. 1-36, 1-42 (1993). Communication to the miner requires that the written report actually be received by the miner. *Id.* at 1-43.

Although Mr. Lacy testified that some of the doctors told him he could not return to work because of his breathing problem, his testimony was not specific as to the doctor who informed him of this or the date and time of the communication. The assumption cannot be made that Claimant was made aware of his totally disabling condition due to pneumoconiosis based on the fact that Dr. Westerfield's opinion was part of the prior record in support of Claimant's first claim for benefits. Therefore, the evidence does not meet the Employer's burden of proving that this information was ever actually communicated to and understood by the miner within three years of this current claim. Thus, Employer has failed to rebut the presumption that every claim is timely filed or that the three-year statute commenced prior to the filing of Mr. Lacy's 2002 claim. As a result, I find that this claim was timely filed.

Subsequent Claim

This case relates to Claimant's "subsequent" claim, filed on April 22, 2002. Because the claim was filed after March 31, 1980, the Regulations at 20 CFR Part 718 apply. 20 CFR § 718.2 (2002). Pursuant to 20 CFR § 725.309(d) (2002), in order to establish that he is entitled to benefits, Mr. Lacy must demonstrate that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final" such that he now meets the requirements for entitlement to benefits under 20 CFR

Part 718. In this particular case, in the last final denial of Mr. Lacy's previous claim, the Board affirmed the Administrative Law Judge's determination that Mr. Lacy had shown the existence of pneumoconiosis and that the pneumoconiosis had arisen out of his past coal mine employment. However, the Board affirmed the determination that Mr. Lacy was not totally disabled due to this disease. In order to be entitled to benefits under Part 718, Claimant must now establish this element. 20 C.F.R. § 718.204 (2002). Therefore, I must consider the new evidence and determine whether Claimant has proved this element of entitlement previously decided against him. If so, then I must consider whether all of the evidence establishes that he is entitled to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994).

MEDICAL EVIDENCE

A claim filed after January 19, 2001, is subject to the revised regulations of Part 718 and 725. The revised regulations impose two requirements on the submission of medical evidence. Initially, they require that the evidence be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. See 20 C.F.R. §§ 718.101 to 718.107. Secondly, the medical evidence must comply with the limitations of Sections 725.414, 725.456, 725.457, and 725.458. Regarding initial evidence offered in support of entitlement to benefits, the regulations provide that claimants and responsible operators are limited to the submission of no more than two chest x-ray interpretations, two pulmonary function tests, two arterial blood gas studies, two medical reports, one report of each biopsy and one autopsy report. 20 C.F.R. §§ 725.414(a)(2)(i) and (3)(i). In addition, the regulations caution that x-ray interpretations, pulmonary function studies, arterial blood gas studies, autopsy or biopsy reports, and physician opinions contained in a medical report "must each be admissible" under Sections 725.414(a)(2)(i), (3)(i) or (a)(4).

The regulations also provide limitations on medical evidence submitted in rebuttal of the opposing party's evidence. 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii). Each party may submit no more than one physician interpretation of each chest x-ray, pulmonary function study, arterial blood gas study, and autopsy or biopsy report submitted by the opposing party. 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii). A party may submit evidence rehabilitative of the evidence rebutted by the opposing party. The party is permitted to submit one "additional statement from the physician who originally interpreted the chest x-ray or administered the objective testing," or "from the physician who prepared the medical report explaining his

conclusion in light of the rebuttal evidence." 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii).

Neither party objected at the hearing under Section 725.414 to the admission of new proffered evidence. After a review of all newly submitted medical evidence, I find no violations of the evidentiary limitations.

1. X-rays submitted with subsequent claim

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 12	5/23/02	5/23/02	Burki	2/1
DX 3	5/23/02	8/12/02	Barrett/B, BCR[2]	Quality re-reading only. Quality "1"
DX 33	6/12/03	6/12/03	Broudy/B	1/1, q/r

2. Pulmonary Function Studies

Exhibit/ Date	Physician	Age/ Height	FEV1	FVC	MVV	FEV1/ FVC	Tracings	Comments
DX 12 5/23/02	Burki	53/69"[3]	1.59	1.90	--	84%	Yes	Good cooperation and understanding. Restrictive defect. Spirometry valid.

[2] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology (designated on the chart as "BCR") may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The Benefits Review Board and the United States Court of Appeals for the Sixth Circuit have approved attributing more weight to interpretations of "B" readers because of their expertise in x-ray classification. *See Warmus v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 261 n.4 (6th Cir. 1988); *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773, 1-776 (1984). The Board has held that it is also proper to credit the interpretation of a dually qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

[3] As there is a discrepancy in the measured heights among the pulmonary function studies, I must make a finding resolving that discrepancy. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). There is no measured height that represents a majority finding by the testers. Therefore, I shall average the heights. An average results in a height of 69.5 inches. Thus, I

DX 33	Broudy	54/70"	1.59	1.96	55	81%	Yes	Good cooperation
6/12/03			1.59*	1.90*	60*	84%		and effort

3. Arterial Blood Gas Studies

Exhibit	**Date**	**pCO2**	**pO2**	**Resting/ Exercise**
DX 12 Burki	5/23/02	41	72	Resting
DX 33 Broudy	6/13/03	39.7	74.3	Resting

Narrative Medical Evidence

Dr. N. K. Burki, a pulmonary specialist,[4] examined Claimant on May 23, 2002 on behalf of the Department of Labor and completed a report based on his exam. (DX 12). Dr. Burki considered Claimant's employment history as reported with his application for benefits and specifically listed his position as a "utility man" from September 1986 to October 1987. The doctor based his opinion on symptoms, medical history, a smoking history of one pack of cigarettes per day for 30 years, x-ray, pulmonary function study, blood gas study, and his examination. Dr. Burki's conclusion was that Claimant had pneumoconiosis and bronchitis which contributed to a "severe restrictive defect." This pulmonary specialist attributed 80% of the miner's defect to coal dust and 20% to his cigarette smoking. His opinion was that Mr. Lacy could no longer perform his usual coal mine work because of his combined pulmonary diseases.

On June 12, 2004, Dr. Bruce Broudy, also board-certified in pulmonary disease, examined the miner. (DX 33) He completed a report that day on Claimant's pulmonary condition and was deposed on July 10, 2004 in regard to that report. Based on medical and family histories, a history of 16 years in surface coal mining, a smoking history of 34-35 pack years, symptoms, the examination, x-ray, pulmonary function study and blood gas study, Dr. Broudy agreed with Dr. Burki that Claimant suffered from pneumoconiosis. He also agreed that Mr. Lacy did not retain the respiratory capacity to perform his work as a coal miner. However, Dr. Broudy suspected a third "process" that may be contributing to Mr. Lacy's ventilatory defect along with coal dust exposure and cigarette smoking. Therefore, he recommended an open-lung biopsy to explore this possibility. Nevertheless, Dr. Broudy affirmed upon deposition that the pulmonary function studies met the regulatory guidelines for pulmonary disability and revealed a restrictive defect. Dr. Broudy was not

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find Claimant's height to be 69.5 inches.

[4] I take judicial notice of Dr. Burki's board certification and have attached the certification documentation.

"comfortable" attributing all of the patient's impairment to cigarette smoking and coal dust exposure, but reported that Mr. Lacy's coal dust exposure was, indeed, a contributing factor.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §725.202(d); *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In *Director, OWCP v. Greenwich Collieries, et al.*, 114 S. Ct. 2251 (1994), the U.S. Supreme Court stated that where the evidence is equally probative, the claimant necessarily fails to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the evidence. As explained above, Claimant must first show that he is totally disabled due to pneumoconiosis to establish a change in his condition from the last prior denial. Therefore, initial discussion of the evidence will be limited to this issue.

Total Disability Based on New Evidence

Claimant has the burden of showing that he is totally disabled by pneumoconiosis to be entitled to benefits. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b) provides several criteria for establishing total disability. Under this section, I first must evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies. A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i), (ii). A "non-qualifying" test produces results that exceed the table values. All of the pulmonary function studies qualified under

the regulatory standards. Thus, this type of evidence supports a finding of total disability under § 718.204(b)(2)(i).

None of the blood gas studies produced qualifying results. Thus, I find this evidence does not support a finding of total disability under § 718.204(b)(2)(ii).

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Under § 718.204(b)(2)(iv), total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Drs. Burki and Broudy both believed that Mr. Lacy was disabled and could not return to his former coal mine work from a respiratory standpoint. These pulmonary specialists based their opinions on their personal observations, accurate working and social histories and objective tests of record that were ordered at the time of their respective examinations. Therefore, these two opinions are well-documented and reasoned and will be given much deference. These two medical opinions are overwhelmingly in favor of finding total disability under § 718.204(b)(2)(iv).

In sum, all of the new pulmonary function studies are qualifying, none of the new blood gas studies are qualifying, and the new medical opinions, which are both reasoned and reliable, report that Mr. Lacy has a totally disabling respiratory impairment that would prevent him from performing his usual coal mine work. Considering all of this evidence together, I conclude that Claimant has established that he is totally disabled under 20 C.F.R. § 718.204(b).

Because Mr. Lacy has established a change in his condition from the last final denial, I will now examine all evidence of record, admitted with Mr. Lacy's original claim and with his subsequent claim, to determine whether a preponderance of all this evidence supports a finding that Mr. Lacy is now entitled to benefits.

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

A detailed description of the x-rays readings submitted with Mr. Lacy's first claim was provided by Administrative Law Judge Richard Morgan in his Decision and Order issued November 3, 1997. (DX 1, pp. 25-27 and p. 37). These readings were of x-rays taken from 1991 through 1995. A majority of those twenty x-ray readings by the most highly-qualified readers were positive for the existence of pneumoconiosis. Therefore, Judge Morgan justifiably found the existence of pneumoconiosis under § 718.202(a)(1) and the Board affirmed this finding as supported by substantial evidence. The new x-ray evidence, submitted with Mr. Lacy's subsequent claim, consists of two interpretations of more recent chest x-rays, taken in 2002 and 2003. The first x-ray, taken in May of 2002, was interpreted as positive by Dr. Burki. Dr. Barrett, a dually-qualified physician, verified that this film was of the highest quality. Dr. Broudy, a B-reader, interpreted the June 2003 x-ray as positive for pneumoconiosis, as well. Thus, the weight of the new x-ray evidence confirms the previous determination that the x-ray evidence establishes Mr. Lacy has pneumoconiosis pursuant to § 718.202(a)(1).

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. As before, this section is still inapplicable to this claim because the record contains no such evidence of this type.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record still contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June

30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant cannot establish pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. A physician's reasoned opinion may support the presence of the disease if it is explained by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986).

Judge Morgan provided a detailed and extensive summary of each medical opinion submitted with Mr. Lacy's initial claim and the factual content of these summaries has not been challenged. (DX 1, pp. 30-35). Therefore, I incorporate these summaries by reference into this Decision and Order. Judge Morgan assigned greater probative weight to the opinions of the more qualified physicians in the area of pulmonary disease, specifically Drs. Anderson, Myers, Westerfield, Jarboe, Broudy and Fino. Judge Morgan then assigned the greatest probative weight to the opinions of the doctors who most recently examined Claimant and whose reports were the most documented and well-reasoned, specifically the report of Dr. Westerfield. In conclusion, Judge Morgan found the weight of these nine opinions established the existence of pneumoconiosis. The Board did not disturb Judge Morgan's finding that a majority of the most reasoned and documented physicians' opinions in the initial record supported a finding of pneumoconiosis under § 718.202(a)(4).

A review of the medical opinions submitted with Mr. Lacy's subsequent claim reveals that Dr. Burki found the existence of coal workers' pneumoconiosis based on the x-ray he ordered, his personal examination, the patient's history and symptoms, and the remaining objective tests of that same date. Thus, I assign significant probative weight to Dr. Burki's opinion, in that his opinion is reasoned and he is an expert in the field of pulmonary disease. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (en banc recon.); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984).

For the same reason, I assign significant probative weight to Dr. Broudy's opinion, which reported that Mr. Lacy has pneumoconiosis based on x-ray evidence, the doctor's examination and other symptoms.

Weighing these two new medical opinions along with the older opinions of record, I find the preponderance of the entire medical opinion evidence of record meets Claimant's burden of

establishing pneumoconiosis under § 718.202(a)(4) of the regulations. Moreover, the Employer has proffered no evidence to overcome the rebuttable presumption that Claimant's pneumoconiosis arose out of his coal mine employment, given the fact that he was employed over 10 years in qualifying coal mining employment. 20 C.F.R. § 718.203(a).

Total Disability Based on Entire Record

Claimant still has the burden of showing that he is totally disabled by pneumoconiosis, based upon all of the evidence of record, before being entitled to benefits. As explained in Judge Morgan's 1997 Decision and Order, a majority of the pulmonary function studies conducted from 1991 through 1995 were not qualifying and a majority of the qualifying studies were invalid due to poor or suboptimal effort on the part of the patient. (DX 1, pp. 27-30). As a result, Judge Morgan found this evidence lacking in support of finding total disability under § 718.204(b)(2)(i). However, the most recent pulmonary function studies, conducted in 2002 and 2003, produced qualifying values and were considered valid tests by those physicians who ordered them. I assign greater probative weight to these tests over the older tests conducted eight years earlier, because of the progressive nature of pneumoconiosis and because of the validity of the most recent study results. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993)(more weight may be accorded to the results of a recent ventilatory study over the results of an earlier study).

None of the blood gas studies submitted with Mr. Lacy's initial claim or his subsequent claim produced qualifying results. Thus, I find this evidence does not support a finding of total disability under § 718.204(b)(2)(ii).

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record still contains no such evidence.

Under § 718.204(b)(2)(iv), total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Of the medical opinions completed from 1991 through 1995, Drs. Fritzhand, Anderson, Lane and Westerfield all found Mr. Lacy totally disabled, while Drs. Myers, Jarboe, Broudy, Wright

and Fino found him not totally disabled. Administrative Law Judge Morgan considered a number of factors in weighing this evidence, including the qualifications of the physicians in the area of pulmonary medicine, the recency of their examinations and accompanying reports, the objective test results underlying their conclusions, the Claimant's testimony surrounding the exertional requirements of his employment after leaving coal mining, and whether the physicians demonstrated familiarity with Claimant's last coal mine employment. (DX 1, pp. 41-42). Taking all these things into account, the Judge determined that some of the most highly qualified physicians found total disability while others did not. However, most of the physicians who found a pulmonary disability had relied on invalid test results. Further, while Judge Morgan found "no reason to discredit" Dr. Westerfield's opinion that Mr. Lacy was totally disabled, he found this opinion insufficient to meet Claimant's burden in light of the pulmonary function and blood gas test results, all of which were non-qualifying. The judge also gave significant weight to the Claimant's testimony that until 1992, he had performed heavy manual labor in the logging industry. Inasmuch as the Board affirmed Judge Morgan's analysis and findings surrounding the relative medical opinions submitted with Claimant's initial claim, I also find that these opinions, alone, do not support Claimant's burden of proving total disability up until that point in time.

Nevertheless, the opinions submitted with Mr. Lacy's subsequent claim based on more recent physical examinations and testing show a significant deterioration in Claimant's pulmonary condition since 1997 when the first Decision and Order was written. Dr. Burki's examination conducted in 2002 shows that Mr. Lacy can no longer perform his usual coal mine work based on the exam, the patient's current symptoms, and qualifying pulmonary function test results. Similarly, Dr. Broudy's 2004 examination revealed that Mr. Lacy does not retain the respiratory capacity to return to his work as a coal miner. Both of these physicians are pulmonary specialists and their opinions deserve deference. Further, these opinions are based on qualifying tests, unlike a majority of the medical reports generated in the early 1990's. Because pneumoconiosis is a progressive disease, I assign greater probative weight to these more recent medical opinions, which are documented and well-reasoned, as well. *See Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 164 (6th Cir. 1997).

Assigning the greatest probative weight to the thorough and reasoned opinions of Drs. Broudy and Burki, supported by the qualifying pulmonary function studies, and considering Claimant's current testimony that he no longer is able to perform the physical activities that he once performed in the

1990's, I find that the weight of this evidence overcomes the non-qualifying blood gas studies, and Claimant has now established total disability under § 718.204(b)(2)(iv).

Pursuant to § 718.204(c), Mr. Lacy must finally prove that his total disability was caused by his pneumoconiosis. To satisfy this requirement, Claimant must demonstrate that his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. *Id.* Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.* Claimant can only demonstrate the cause of his total disability by means of a physician's documented and well reasoned medical report. 20 C.F.R. § 718.204(c)(2).

Of the opinions submitted with Mr. Lacy's initial claim, five out of the nine reporting doctors found Mr. Lacy was not totally disabled, so that those five obviously will not be helpful in determining the cause of the miner's disability. Of the four who found Mr. Lacy disabled, only Drs. Anderson and Westerfield attributed at least a portion of the disability to Mr. Lacy's past coal mining employment. Thus, Administrative Law Judge Morgan, as affirmed by the Board, appropriately determined that a preponderance of the reasoned opinions did not support a finding that pneumoconiosis was a contributing cause to Mr. Lacy's pulmonary disability.

Again, the two more recent medical opinions support Claimant's contention that he is now disabled due to pneumoconiosis as defined in the regulations. Dr. Burki, whose opinion I have already noted is well reasoned and documented, attributed 80% of Mr. Lacy's pulmonary disability to the patient's exposure to coal dust. Therefore, Dr. Burki's report supports a finding that pneumoconiosis has a "material adverse effect on the miner's respiratory or pulmonary condition."

Dr. Broudy did not necessarily agree with Dr. Burki's assessment of causation as broken down into specific percentages, but admitted that pneumoconiosis was at least a factor contributing to the patient's disability. The fact that Dr. Broudy suspected a third unknown cause does not detract from this physician's finding that pneumoconiosis and Claimant's past smoking habit were already two known contributors to Mr. Lacy's current pulmonary defect. Therefore, Dr. Broudy's opinion also supports a finding that pneumoconiosis has a material adverse effect on Claimant's current pulmonary condition.

Weighing the medical opinions and assigning the greatest probative weight to the more recent reasoned opinions by Drs. Burki and Broudy, I find that the Claimant has met his burden of showing that his total disability is due to pneumoconiosis as defined under § 718.202(c).

ENTITLEMENT

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of onset of total disability. The claimant bears the burden of proof in establishing the date of onset and must demonstrate the date he became totally disabled due to pneumoconiosis. *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Johnson v. Director, OWCP*, 1-BLR 1-600 (1978). Where the evidence does not establish the month of onset, benefits begin with the month during which the claim was filed. 20 C.F.R. § 725.503(b).

Although Mr. Lacy resigned from coal mining in 1987 and his initial claim was denied in 1997, the record is not clear as to when he became disabled due to pneumoconiosis. Therefore, I find that he is entitled to benefits beginning with the month he filed his subsequent claim, April of 2002.

ATTORNEY FEE

Claimant's counsel has fifteen days from the date of receipt of this decision to submit an application for an attorney's fee. The application must be served on all parties, including Claimant, and proof of service must be filed with the application. The parties are allowed fifteen days following service of the application to file objections to the fee application. If no response is received within this fifteen day period, any objections to the requested fees will be deemed waived.

In preparing the attorney's fee application, the attention of counsel is directed to the provisions of §§ 725.365 and 725.366. According to these provisions and applicable case law, the fee application of Claimant's counsel shall include the following:

1. A complete statement of the extent and character of each separate service performed shown by date of performance;

2. An indication of the professional status (e.g., attorney, paralegal, law clerk, lay representative, or clerical) of the person

performing each quantum of work and customary billing rate:

3. A statement showing the basis for the hourly rate being charged by each individual responsible for the rendering of services;

4. A statement as to the attorney or other lay representative's experience and expertise in the area of Black Lung law;

5. A listing of reasonable and unreimbursed expenses, including travel expenses; and

6. A description of any fee requested, charged, or received for services rendered to the claimant before any state or federal court or agency in connection with a related matter.

ORDER

Accordingly, the Employer is ordered to pay the following:

1. To Claimant, all benefits to which he is entitled under the Act, commencing April 1, 2002;

2. To Claimant, all medical and hospitalization benefits to which he is entitled commencing April 1, 2002, or otherwise provide for such service; and

3. To Claimant's attorney, fees and expense to be established in a supplemental decision and order.

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RUDOLF L. JANSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire,

Esquire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2605, Washington, D.C. 20210.